On October 10, 1991, and November 6, 1991, a contested case hearing was held in (city), Texas, to determine whether respondent sustained an injury in the course and scope of his employment with (employer). (hereafter "Employer"). The hearing officer, (hearing officer), determined that respondent was injured in the course and scope of his employment with Employer and, therefore, decided that respondent was entitled to income benefits and medical benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act). Appellant contends that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be manifestly unjust. Appellant requests us to reverse the hearing officer's decision and render a decision in its favor. Respondent did not file a response to appellant's request for review.

DECISION

Finding that the determination of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm his decision awarding workers' compensation benefits to respondent in accordance with the 1989 Act.

When reviewing questions of factual sufficiency, we consider and weigh all the evidence, both in support of and contrary to the challenged finding. We should uphold the finding unless we determine that the evidence is so weak or the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He or she is privileged to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, supra. However, the claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). The weight to be given conflicting expert testimony is also a matter for the trier of fact. Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.).

The record in this case reveals that on (date of injury), respondent was employed as a truck driver for Employer, who is in the lumber business, and appellant was Employer's workers' compensation insurance carrier. One of the Employer's customers, who is in the construction business, requested Employer to send a truck to a school construction site and pick up a load of lumber which the customer wanted to return to Employer. Respondent was instructed to accomplish that task on the morning of (date of injury).

According to respondent, when he arrived at the construction site alone in Employer's empty flat bed truck, one of the customer's foremen, (foreman), instructed two hispanic construction crew workers to assist him in loading the truck. Respondent said that the lumber was 14 feet long and measured 2 x 6 or 2 x 8, and was in two containers. He testified that he backed the truck up to one of the containers, got on the truck bed, and then stacked the lumber as it was handed to him by the two men on the ground. He said he

bent down at the rear of the truck, the men handed him the lumber from where they were on the ground, and he "walked" the lumber to the front of the truck bed and stacked it where it would not fall off the truck. He said he was on top of the stacked lumber so that as the stack grew higher, he had to bend down more to have the lumber handed to him.

When the lumber from the first container was loaded, he said he backed the truck up to the second container and they started loading from it. After stacking a total of about 300 boards, he said he felt a "pop" in his back, and pain in his lower back and groin, as he was bending down to take another piece of lumber from one of the men. He testified that he said, "oh" when this happened, grimaced, grabbed his back, and slowly stood up. Then, he said he waved his hands to motion to the men to stop loading.

Respondent stated that he did not tell his two helpers that he hurt himself because they did not speak English. Although there was more lumber to be loaded, he stopped loading when he hurt himself. He said he called his supervisor on his truck radio and reported that he was hurt and needed to see a doctor. He stated that he then drove back to Employer's yard and told both his supervisor and the president of the company that he had hurt his back and groin and needed to see a doctor. A (Mr. B) drove him to Dr. M's office the same day. He said that Dr. M wanted him to see a bone specialist and to have a MRI study. Later, he said that Employer asked him to see Dr. F.

Respondent further testified that the injuries he sustained in a vehicle accident in 1990 were to his upper back and neck, and were not to his lower back and groin as in this incident. He also testified that (Mr. B) and the foreman at the construction site, (foreman), both of whom testified for appellant, were not the men who helped him load the truck. He said he didn't know the names of the men who helped him, and had never seen (Mr. B) before the hearing.

(Mr. B) testified through a Spanish-speaking interpreter. He said he did not speak English. Although he did not remember respondent, the date the lumber was loaded, nor the name of the company that picked up the lumber, he did recall that one morning at the school construction site, he and his foreman, (foreman), helped load 2 x 6 and 2 x 8 lumber onto a flat bed truck. He said he could recall the event because, with that one exception, he had always unloaded lumber, and not loaded lumber, at the construction site. He said that he and his foreman pushed about 200 boards onto the truck. He did not see the truck driver lift anything or pull the lumber onto the truck. He stated that the driver only "help settle" the lumber. He did not see the driver wave his hands, grab his back, or give any indication that he had hurt himself. He said that the driver was in the truck bed, but he did not see the driver stand on top of the stack of lumber in the truck. He testified that the driver stood in a little space between the front of the truck bed and the stack of lumber, and that later on the driver was at the edge of the truck bed. He stated that he knew to stop loading the truck when his foreman said "that's all we have," although there was more lumber there. He said that there were two "little trailers" at the site, but only one had lumber in it.

(Foreman), who speaks English, testified that he was the construction company's carpenter foreman at the school construction site on (date of injury), and that he had requested Employer to pick up about 300 pieces of lumber at the site. Contrary to respondent's testimony, he testified that he and (Mr. B), appellant's other witness, were the two men that helped respondent load the lumber onto Employer's truck on that day. He said that only the three of them were present while the truck was loaded.

He described the lumber as 2 x 8 and 2 x 6 and 14 feet long. He said that respondent stayed in the truck bed while he and (Mr. B) picked up the lumber from inside a container, carried it to the truck, and pushed it all the way to the end of the truck. This witness testified that respondent guided the wood using his legs, feet, and hands, and straightened the boards to stack them neatly. He never saw respondent pick up a piece of lumber to reposition it. He said they loaded lumber from only one of the two containers the lumber was in because, when they finished with the first container, respondent told him the truck could not handle more. He stated that respondent said he would come back for the rest of the lumber but no one from Employer ever picked up the remaining lumber. He said he asked for and was given a receipt for the lumber by respondent, and that only 193 boards were loaded on the truck. This witness testified that respondent did not tell him he hurt his back, grimace as if in pain, wave his hands back and forth, nor try to get his attention as if something was wrong with him. He also testified that respondent did not seem to have any difficulty strapping down the load. This witness said he could recall the incident because it was the only time he had returned lumber on that construction project. However, he showed some uncertainty in being able to identify respondent as the driver of the truck when he indicated that he would not have been able to testify that respondent was the man he saw on (date of injury), if no one had identified him during the hearing.

Medical records and reports introduced into evidence reveal that respondent was initially treated by Dr. M, who took x-rays, gave him an injection, and took him off work. Then he was examined by Dr. S, M.D., on March 21, 1991, for complaints of pain in the back, left leg, and left inguinal region. Dr. S's report reflects that respondent told him that he was injured while loading lumber with two other workers, that respondent was given a physical examination, and that he was diagnosed as having low back pain with left inguinal radiculopathy. Respondent was put in a back brace and instructed to stay off work. On June 19, 1991, respondent was examined by Dr. F, M.D., an orthopaedic doctor. This doctor could not find any objective demonstrable ongoing neuromuscular pathology which could be associated with an unverifiable soft tissue strain of the low back three months before, and opined that respondent probably resolved this injury. He also found no demonstrable objective evidence of nerve compression. Later, Dr. F reviewed the radiology report of respondent's lumbar MRI, in which the radiologist indicated that no significant abnormalities were demonstrated. Dr. F stated that the L5-S1 level showed a degenerative disc. He could find no causal relationship between the degenerative disc and the asserted single event of (date of injury).

The evidence in this case is markedly conflicting. Appellant's two apparently disinterested witnesses, who do not work for respondent's employer nor know respondent, sharply contradicted respondent's version of his activities in loading the lumber. However, one witness could not identify respondent as the truck driver he testified about, and some doubt was cast on the other witness' ability to identify respondent as the truck driver he testified about. Yet, both were adamant about their ability to recall the loading of the truck. Respondent was just as unyielding in his denial of those witnesses' involvement in loading the truck. This conflict in the evidence was for the hearing officer to resolve. Article 8308-6.34(e); Garza, supra. Although respondent's testimony as an interested witness raised no more than a fact issue, the trier of fact had the right to believe his testimony, and believing it, had a right to find that he did suffer a compensable injury. Baugh, supra. If there was a conflict between Dr. S's diagnosis of March 21, 1991, which corroborated to some extent respondent's testimony concerning the fact of an injury, and Dr. F's subsequent evaluations in June and October 1991, which appear to relate more to the extent and duration of the injury than to the fact of an injury on (date of injury), that conflict, if any, in their expert

opinions was also for the trier of fact to resolve. Atkinson, supra. We find that the hearing officer's determination that respondent suffered a compensable injury is not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, supra.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge